IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JOSEPH SALAS TORRE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON

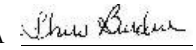
Superior Court No. 16-1-00970-9

BRIEF OF RESPONDENT

TINA R. ROBINSON
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE	Jodi R. Backlund Po Box 6490 Olympia, Wa 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED January 31, 2018, Port Orchard, WA  **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Michael Joseph Salas Torre[1] was originally charged by information filed in Kitsap County Superior Court with possession of controlled substance-methamphetamine and driving under the influence (dui). CP 1-2. A first amended information added charges of driving while license suspended or revoked in the third degree and bail jumping. CP 57-60. A

second amended information added to the other four charges the charge of making a false or misleading statement to a public servant. CP 100. But a third amended information, filed just four days later, omitted the false or misleading statement charge. CP 102-105.

The jury reached no verdict as to count I, possession of controlled substance, and count II, dui. CP 143-44. The trial court declared a mistrial regarding those two counts. Count I was later dismissed on the state's motion in exchange for Salas Torre's plea of guilty to the driving under the influence charge. CP 188-190.

Salas Torre entered a plea of guilty to the dui charge. CP 213. The statement of defendant on plea of guilty advised Salas Torre that the state considers his offender score to be 12 based on five Washington felony convictions, six Guam felony convictions, and a point for being on supervision at the time of the instant offense. CP 213-14.

The judgment and sentence under the heading "current offenses" lists the possession of controlled substance (count I) and dui (count II) convictions only.[2] CP 221. However, the "sentencing data" section lists those two offenses and the bail jumping (count IV) and Torre was sentenced on all three convictions. CP 222-23. The bail jumping

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[1] At RP, 2/8/17, 3, the defendant indicates to the trial court that his full last name is "Salas Torre."

conviction resulted in a 53 month sentence with lesser time periods on the other two counts running concurrently with the bail jump sentence. CP 223. Later, an amended judgment and sentence was entered which properly noted that count I had been dismissed and properly included the driving with license suspended conviction. CP 250. The corrections had no effect on the sentencing of the matter; the bail jumping convictions still controlled with 53 months and the other offenses run concurrent.

As noted, the bail jumping charge was sentenced with a 12 offender score. CP 222; 251. The 12 was the result of counting six convictions out of Guam. Id. These include three convictions for first degree criminal sexual conduct, two convictions for second degree criminal sexual conduct, and one conviction for kidnapping. Id. These offense occurred on May 3, 1993 and were sentenced on June 28, 1993. Id.

Recognizing that the Guam convictions needed to be compared to Washington law, the state provided the trial court with documents from the Guam cases. CP 156-82. The documents include the Territory of Guam charging document. CP 157-59. A Territory of Guam judgment and amended judgment. CP 160-63. A copy of the decision of the United State Court of Appeals for the Ninth Circuit affirming the convictions. CP

[2] But, as noted, count one had been dismissed by agreement.

164-67. Copies of the Guam Code Annotated defining first and second degree criminal sexual conduct. CP 168-73. The state also provided copies of Washington statutes defining kidnapping, third degree rape, second degree assault, and the special allegation of sexual motivation. CP 174-82.

When the jury returned its verdicts, the state raised the issue of the Guam convictions. 3RP 444.

B. FACTS[3]

Salas Torre was stopped by a Washington State Patrol trooper because he failed to dim a bright headlight as the trooper went by him in the opposite direction. 1RP 82. While discussing the operation of his high-beams with Salas Torre, the trooper noted that Salas Torre's speech was slurred and somewhat incoherent. 1RP 85.

Observations of Salas Torre led to the trooper asking him to exit the car. 1RP 91. Eventually, the trooper developed probable cause to believe Salas Torre was impaired by a drug (1RP 125) and arrested him. 1RP 102. He was transported to Harrison Hospital for a blood draw. Id.

[3] The court reporter has numbered the volumes of trial testimony as volume 1, volume 2, etc. The state will refer to volume 1 as "1RP" and etc. Other hearings will be referred to by the date of the transcript.

Salas Torre's car was searched. 1RP 128. Items suspected of containing methamphetamine were found. One item, exhibit 16, was found to contain methamphetamine. 1RP 225.

A toxicology test of Salas Torre's blood revealed that there was methamphetamine in his blood. 1RP 198. The level of drugs in his system were 11 times greater than the upper level of a therapeutic dose. 1RP 216.

A deputy clerk from the Kitsap County Clerk's Office testified that Salas Torre had been arraigned in the case and an omnibus hearing had been set. 3RP 326-27. At that first omnibus hearing, another omnibus hearing was set because the omnibus hearing was continued. 3RP 327. The continued omnibus hearing was rescheduled for November 3. Id. On November 3, "Judge Houser granted a bench warrant." 3RP 327.

The deputy clerk testified that the in-court clerks keep minutes of the hearings that include whether or not the defendant was present. 3RP 328. Admitted Exhibit 8 showed that Salas Torre was placed under conditions of release in the case. 3RP 328. A notice to appear at a subsequent hearing includes the recitation that "written and oral notice given to the defendant for the above set date."

Clerk's minutes in this case show that Salas Torre was present in court on October 6, 2016. 3RP 330. At that hearing, Salas Torre was

given notice of the November 3 court date. Id. That order included a reset trial date as well as the November 3 date. 3RP 331-32. The order tells the defendant that he must be personally present. 3RP 333.

Clerk's minutes from November 3 indicate that Salas Torre was not present. 3RP 334. An order for a bench warrant issued. Id. The bench warrant was issued in the name of Michael Joseph Salas Torre. Id.

III. ARGUMENT

A. NO ERROR OCCURS WHEN THE STATE PRESENTS EVIDENCE FROM A JUDGE, NOT THE TRIAL JUDGE, ON A NECESSARY ELEMENT OF A CRIME.

Salas Torre argues that because a judge found that he had failed to appear for a hearing and upon trial before another judge that finding was used to prove an element of bail jumping, that the first judge's finding was an unconstitutional judicial comment on the evidence. This claim is without merit because the judicial officer presiding over the trial made no comment on any fact and nothing in Washington Constitution prohibits a superior court judge from providing facts in a case over which she does not preside.

First, Judge Houser made no judicial comment on the evidence in this case. But insofar as Salas Torre argues that there was such a

comment, he is correct that the standard of review is *de novo. See State v. Jackman, infra.*

Second, neither trial counsel nor appellate counsel has argued that the document from which this issue flows was not properly admitted into evidence. Thus there was no cognizable error in admitting the order for bench warrant.

Article IV, §16 of the Washington Constitution provides that "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." The plain language of the provision reveals the infirmity of Salas Torre's argument. Here, Judge Houser was not the trial judge and thus was not in a position to charge this jury at all. Nor could Judge Houser declare the law in this trial. Further, the fact flowing from the order of bench warrant in this case is simply not a "comment" on the evidence--it is evidence. Salas Torres provides no argument or authority that judges who are not presiding over a trial may not be fact witnesses in that trial.

Nonetheless, according to Salas Torre, no judicial officer may give facts in a case without violating the constitutional prohibition of judges commenting on the evidence. This position seems to make a crime like RCW 9A.72.160, intimidating a judge, unconstitutional on its face because a judge would have to testify as to the actual threat leveled at the

judge and the circumstances as to the ruling or decision sought to be influenced by the threat. Moreover, it would be the state's hope in such a prosecution that the judge's testimony would conclusively establish those elements of the offense.

As is the case with the authority that Salas Torre asserts, the judicial history of Article IV, §16 makes it clear that the provision applies to the behavior of the trial judge and not to a judge as witness. The Supreme Court of Washington considered the provision in 1891 in *Bardwell v. Ziegler,* 3 Wash. 34, 28 P. 360. Curiously, the allegedly offending comment does not appear in the decision. But the Court's consideration of the provision makes it clear that the Court is discussing the actions of the trial judge *qua* trial judge, there being no reference to the occurrence of a judge as witness.

Thus, "[i]t seems to us the framers of the constitution could not have more explicitly stated their determination to prevent the judge from influencing the judgment of the jury on what the testimony proved or failed to prove." 3 Wash. at 42. In the present case, there is no possibility that Judge Houser could have stated in this trial what the testimony proved or failed to prove. Further,

> our constitution evidently intends that the judge shall make no reference to the testimony for the purpose of informing the jury what it proves or does not prove, but shall content himself with declaring the law; for, after the inhibition in

> regard to his commenting upon the facts, this negative proposition occurs, but shall declare the law.

Id. Here, Judge Houser in effect provided testimony and, again, was in no position to have reference to the testimony taken in the trial. And, again, Judge Houser could not "declare the law." The *Bardwell* court noted that trial judges may use phrases like "If you find from the evidence that such a state of facts exists, then the law is as follows." Id. "But to tell the jury there is no dispute in the testimony on a certain point, or that anything is conculsively (sic) proven, is going too far." Id. The recitation of facts in the bench warrant form provided Judge Houser with no occasion to advise this jury with regard to any testimony or evidence or to assert that any fact in issue has been proven or not proven.

In *Patton v. Town of Auburn,* 41 Wash. 644, 84 P. 594 (1906), plaintiff sued the town of Auburn over a slip and fall. After judgment for the plaintiff, the town appealed arguing in part that the trial judge had violated Article IV, §16. It was argued that the plaintiff had presented a claim to the town at a certain time. 41 Wash. at 647. The trial court sustained an objection to this argument and advised the jury that "there was no evidence of the presentment to the town of any claim by respondent [plaintiff below]." Id (alteration added). The *Patton* Court said of the provision

> Evidently it was not the intention of the framers of the Constitution that this provision should impose any undue restraint upon a trial judge in passing upon the competency or admissibility of evidence, or in instructing the jury as to the law. We think their intention was to provide against any undue influence being exerted upon the jury by the judge communicating to them his opinion as to facts proven or not proven by the evidence.

Id. Thus again it can be seen that it is the purpose of the provision to prohibit announcement of the trial court's opinion regarding the evidence adduced in the trial. The provision does not apply to a situation such as here were a judge as witness does not know what other evidence was adduced and therefore could have no opinion of the evidence.

All reported cases of which the state is aware on this issue, including *State v. Jackman* upon which Salas Torre relies are to the same effect. That is, they all deal with the actions of the trial judge. For instance in *City of Seattle* v. *Arensmeyer,* 6 Wn. App. 116, 120, it was said that "The purpose of the provision 'is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted.'" (*citing Heitfeld v. Benevolent and Protective Order of Keglers,* 36 Wn.2d 685, 699, 220 P.2d 655, 663 (1950).)

In *Jackman,* the trial court put the dates of birth of the alleged victims in the "to convict" instructions on various counts of sexual misconduct with minors. Thus *Jackman* is a case where the trial judge

actually charged the jury as to a matter of fact—the ages of the alleged victims, which were elements of the offenses. Nothing even resembling this situation appears in the present case. If we suppose that Judge Houser was a witness in *Jackman* and he testified that he had personal knowledge of the ages of the victims and then provided those ages to the jury, then we have circumstances that resemble the present case. The judge would come to the witness stand possessed of his title of Superior Court Judge, and enjoy the credibility that may well attend that title, but still would be in no position to charge the jury as to anything. He is just a witness.

Take a further supposition about the present case: suppose the state had called the judge to the witness stand. When asked whether or not Salas Torre made a personal appearance before the court on November 3, 2016, the judge responds "No. He was not present." The state can see no way that such testimony involves a judicial comment, even though the testimony may be very broadly defined as a judge commenting on the facts of the case. Moreover, as said before, in this hypothetical the state would very much desire that the judge's testimony conclusively establish the point.

The *Jackman* Court held that in addressing prejudice from a judicial comment, the state is burdened to "affirmatively show that no prejudice could have resulted." 156 Wn.2d at 745. Since testimony

tending to prove an element of a crime is always prejudicial to the defendant, we note that it is the judicial comment that either did or did not cause prejudice. And since there was no comment in this case, no prejudice could have resulted from a comment. But even if the notion of comment could be extended to cover Judge Houser's evidence, the record shows no prejudice.

Whether the evidence was received by reference to the bench warrant form or by calling the judge to the witness stand, the character of the evidence remains the same. The state must prove that Salas Torre failed to make a personal appearance before the court on November 3, 2016. RCW 9A.76.170. It is apparent from the evidence that the judge was in attendance on that date. Thus, the judge has personal knowledge that Salas Torre failed to make a personal appearance before the court on that date. ER 602. The judge is a percipient witness and not else in this case. The evidence was adverse to Salas Torre but not prejudicial in the sense of prejudice caused by a comment on the evidence. There being no unconstitutional comment by the trial judge in this case, this claim fails.

B. RCW 9A.76.170(1) HAS NO TIME ELEMENT AND REQUIRES THAT A DEFENDANT MAKE A "PERSONAL APPEARANCE" BEFOE THE COURT .

Torre next claims that the elements of bail jumping were not established. This claim is without merit because the bail jumping statute has no time element and because time is irrelevant to the question of whether or not Salas Torre made a personal appearance before the court as ordered.

It is well settled that evidence is sufficient if, taken in a light most favorable to the state, it permits a rational trier of fact to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the state's evidence and all reasonable inferences that can be drawn therefrom. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Thus the relevant inquiry is "whether, after viewing the evidence

in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358 (1991).

Further, interpretation of a statute is a question of law that is reviewed de novo. *State v. Coucil*, 170 Wn.2d 704, 706, 245 P.3d 222 (2010). "Where the plain words of a statute are unambiguous, our inquiry is at an end." Id. But "[i]f a statute is susceptible to more than one reasonable interpretation, it is ambiguous and, absent legislative intent to the contrary, the rule of lenity requires us to interpret the statute in favor of the defendant." Id., *citing State v. Jacobs*, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005). The purpose of interpretation is to determine and carry out the intent of the legislature. 170 Wn.2d at 707. At least one court has held that the predecessor bail jumping statute is not ambiguous. *State v. Pope*, 100 Wn.App. 624, 628, 999 P.2d 51 (2000) ("Neither the phrase "convicted of" nor the statute as a whole is ambiguous." (emphasis added)).

RCW 9A.76.170(1) provides

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

Here, the jury was charged with an elemental instruction that provides

> (1) That on or about November 3, 2016, the defendant failed to appear before a court;
>
> (2) That the defendant was charged with a class B or C felony;
>
> (3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and
>
> (4) That the acts occurred in the State of Washington

CP 284 (instruction 19); *see State v. Downing*, 122 Wn. App. 185, 192, 93 P.3d 900 (2004) (establishing that bail jumping charges may proceed even when underlying charge is dismissed). The instruction is taken from WPIC 120.41. In this sufficiency of the evidence section, Salas Torre asserts no argument as to elements (2), (3), and (4). He correctly argues that a jury's verdict cannot be based on "mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence" but never articulates the manner in which the present jury in fact decided the present case by resort to any of these less-than-substantial considerations.

As can be seen, neither the statute nor the jury instruction refer to a time. *State v. Coleman*, 155 Wn. App. 951, 231 P.3d 212 (2010), does not change that fact. Moreover, *Coleman* is factually distinct from the present case. This Court considered this statute in *State v. Hart*, 195 Wn. App. 449, 381 P.3d 142 (2016), *review denied*, 187 Wn.2d 1011 (2017). Hart challenged the sufficiency of evidence on his bail jumping conviction.

195 Wn. App. at 457. He argued that the state failed to prove beyond a reasonable doubt that he had failed to appear "at the required specific time." Id. Hart relied on *Coleman* a case where a conviction had been reversed because the evidence showed that the defendant had been held to have failed to appear at 8:30 a.m. when he had been ordered to appear at 9:00 a.m. Id. (arguing *State v. Coleman*, 155 Wn. App. 951, 231 P.3d 212 (2010)). *Coleman* was distinguished by the *Hart* Court as it affirmed Hart's conviction:

> Unlike in *Coleman*, where the evidence established that the defendant had failed to appear *before* the time he was ordered to do so, here the jury could reasonably infer that Hart failed to appear at the time specified in his order based on Myklebust's testimony that Hart did not appear for his September 9 hearing, together with the clerk's minute entry showing that Hart failed to appear at that hearing and that the prosecutor had requested a bench warrant based on Hart's absence from the hearing.

155 Wn. App. at 458 (emphasis by the court). The same sort of testimony supported the conviction in the present case. Here, Salas Torre has no argument that he was held to have failed to appear at a time before he was ordered to appear. Thus *Coleman* provides Salas Torre with no support.

The statute places no burden on the court. Trial courts can and do schedule multiple criminal cases at the same time. The criminal presiding calendar in any given superior court may have 20 or 30 cases all scheduled at 9 a.m. According to Salas Torre, this will not do. Rather, each

defendant must be given the exact time that she must make a personal appearance before the court. Otherwise, the defense will claim insufficiency as is done here: she was ordered to appear at nine but the court did not call her case until ten so she gets a free pass on bail jumping even if she was not there at either nine or ten. To appear "as required" simply means the defendant must make a "personal appearance" before the court, not that the court is required call that case at a precise time.

Possible temporal problems with bail jumping prosecutions evaporate when the requirement of the statute is simply put. The statute requires a "personal appearance" by the defendant on a certain date. Without a "personal appearance" before the court, because, for instance, of a failure to appear, a defendant is liable under the statute. Whatever else may have happened in this case, the record is clear that Salas Torre simply did not make a "personal appearance" before the court on November 3, 2016 as ordered. Moreover, that failure was proven in this case. The evidence was sufficient.

C. THE CHARGING DOCUMENT WAS SUFFICIENT.

Torre next claims that the information in this case failed to charge the offense of bail jumping. This claim is without merit because the

necessary elements appear in the information and because the charging language could have caused no prejudice.

"All essential elements of a crime ... must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." *State v. Zillyette,* 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (En banc) *quoting State v. Kjorsvik,* 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The issues follows from the Sixth Amendment of the United States Constitution and Washington Constitution Article I, §22 and is therefore reviewed *de novo*. Id.

The recent *Zillyette* case lays out the rules to be applied to such claims. "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." 178 Wn.2d at 158 (citation omitted). '[E]ssential elements' include only those facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime." 178 Wn.2d at 158 (citation omitted). Essential elements include statutory and nonstatutory elements. Id. (citation omitted).

The essential elements rule has two goals: "The primary goal of the 'essential elements' rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against." 178 Wn.2d at 158-59 (citation and page break omitted). "A secondary purpose for the

essential elements rule is to bar any subsequent prosecution for the same offense." 178 Wn.2d at 159 (citation omitted).

When an information is challenged for the first time on appeal, "an appellate court will liberally construe the language of the charging document in favor of validity" *Zillyette,* 178 Wn.2d at 161, *citing Kjorsvik, supra,* 117 Wn.2d at 105. This liberal interpretation rule addresses both the defendant's right to notice and the state's interest that the defendant not "sandbag" and raise the issue after the state has rested. Id. The balancing of these concerns leads to a two prong test: "(1) do the necessary elements appear in any form, or by fair construction, on the face of the document and, if so, (2) can the defendant show he or she was actually prejudiced by the unartful language." 178 Wn.2d at 162, *citing Kjorsvik,* 117 Wash.2d at 105–06.

The foregoing principles were applied to a document charging controlled substance homicide in *Zillyette.* The information made the charge using the generic term "controlled substance." 178 Wn.2d at 156. The statute requires that the fatal controlled substance be either a Schedule I or II narcotic. Id. at 159. But one of the two fatal drugs delivered by the defendant was from Schedule IV. Id.

The court notes that "[t]he specific identity of a controlled substance is not necessarily an essential element of controlled substances

homicide." Id. at 160. However, "Simply alleging that an accused person delivered a controlled substance in violation of RCW 69.50.401 does not satisfy the essential element rule because it is over inclusive." Id. Zillyette prevailed because "To effectively charge Zillyette with controlled substances homicide, the information needed to include the identity of the controlled substance—methadone—or at least the schedule under which methadone falls, Schedule II." 178 Wn.2d at 163.

Salas Torre argues that the language that the defendant "was held for, charged with, or convicted of a particular crime" must be included. Brief at 15. And, according to Salas Torre, nothing in the information covers this ground. Brief at 16. The information herein said "did fail to appear or did fail to surrender for service of sentence in which a Class B or Class C felony has been filed." CP 105. Here, the "convicted of a particular crime" piece is irrelevant.

First, the charge covers "held for" by saying that Salas Torre was "released by court order or admitted to bail." CP 105. Salas Torre does not seem to argue that one must be actually in custody so his release status accurately accounts for the "held for" part of the argument.[4] Second, the "charged with" portion of the phrase is rather clearly covered by the charging language "in which a Class B or Class C felony has been filed."

[4] Of course it would likely be difficult to fail to appear for court if one is held in custody.

Next, the state finds Salas Torre's argument that the charge omitted something to be done "as required" difficult to follow. The ground was covered by the phrase "with knowledge of the requirement of a subsequent personal appearance before a court of this state." CP 105 (emphasis added). As seen above, if one makes his personal appearance, he has done what the statute requires; if he does not, he has not. Thus the element of appearing "as required" is established. It remains unclear in regard to elements what else Salas Torre argues is required. Moreover, "[Salas Torre] has not shown what language potentially confused him or how he was in fact prejudiced." *State v. Howard,* 1 Wn. App.2d 420, ¶46, 405 P.3d 1039 (2017) (alteration added). And, further, he does not argue how whatever else is required is a fact "whose specification is necessary to establish the very illegality of the behavior charged." *Zillyette,* 178 Wn.2d at 158 (internal quotation marks omitted).

Addressing these alleged necessary elements in the manner just done is consistent with the case from which the phrase came. *State v. Pope,* 100Wn.App. 624,627, 999 P.2d 51 (2000) *review denied (twice)* 141 Wn.2d 1018 (2000) and 141 Wn.2d 1019 (2000). Reading the same statutory language, the *Pope* Court found that the first element of bail jumping is "was held for, charged with, or convicted of a particular crime." Id. at 52-53. The formulation is in the alternative: the first

element may be either "was held for" or "charged with" or "convicted of." Each in turn describes a situation where the statute applies. Clearly, this formulation does not require that each of these situations occur in a single case. If "convicted of" was required in all cases, the statute could not apply to pretrial failures to appear.

Additionally, the *Pope* Court disapproved of an elemental instruction that simply used the phrase "regarding a felony matter" saying that that reference would pass muster if it recited that the crime was a "Class B felony." 100 Wn. App. at 629-30. That is how the present case was charged and how the jury was instructed.

Using the post-verdict liberal interpretation rule, the charge in this case was not deficient. All those things that make bail jumping a crime were included. There is no argument asserted as to how the charging language failed to provide Salas Torre with sufficient notice of the crime charged. The issue raised is an exercise in semantics with no prejudice apparent. This issue fails.

D. SALAS TORRE WAS PROPERLY SENTENCED

Torre next makes various arguments about sentencing in the matter, claiming that state failed to prove factual comparability with regard to the Guam offenses, that the trial court's comparability analysis

constitutes unconstitutional judicial fact finding, that some of the Guam convictions should not have been counted, that the Guam convictions constituted same criminal conduct, and, finally, that his attorney was ineffective. This claim is without merit because **.

1. The elements of the crimes under Gaum law in 1992 are clearly stated in the indictment.

Salas Torre claims that the trial court's comparability analysis is incorrect because the state did not prove the elements of Gaum law at the time of the convictions in 1992. However, the elements of each offense are clearly stated in the Territory of Gaum indictment.

The seminal case on issues of the comparability of foreign convictions to Washington law is *In re Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005). That case dealt with the comparability of federal bank robbery. The Court noted that there is a two part test. First, the trial court compares the elements of the two crimes. 154 Wn.2d at 255. If they are not "substantially similar," then the court may look to the defendant's conduct "as evidenced by the indictment or information" to see if that conduct would violate Washington statutes. Id. Thus the Washington Supreme Court allows reference to a charging document in doing a comparison.

Salas Torre adds that the foreign elements being compared must be the elements that existed under the foreign law at the time of the foreign conviction. *In re Crawford*, 150 Wn. App. 787, 793, 209 P.3d 507 (2009) ("The trial court compares the elements of the out-of-state crime with the elements of the Washington crime as defined on the date the out-of-state crime was committed."). The state agrees with this truism; how would the other jurisdiction charge the defendant with other than the then current statutory elements? In the present case, however, Salas Torre makes more of this truism than it warrants, saying that the 1992 statutes from Guam were not presented to the trial court so the trial court could not compare elements of the then-existing crimes.

But nowhere in the *Lavery* decision is there stated a requirement that the elemental comparison be done by reference to the statutes themselves. Rather, *Lavery* clearly allows reference to the indictment. Moreover, as noted, it stretches credulity too far to assume that the elements listed in the charge were not the statutory elements in the statute at the time of the charge. Here the trial court considered the indictment, which document is replete with the elements of the charges. CP 157-59.

The Federal Rules of Criminal Procedure apply to all criminal proceedings in "the district court of Gaum." FRCP (1)(3). The rules require that "The indictment or information must be a plain, concise and

definite written statement of the essential facts constituting the offense charged…" Under Washington CrR 2.1, "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." They are nearly identical. Thus in Gaum and in Washington, the rules require that the essential elements be found in the indictment.

Further, as has been seen, the Washington essential elements rule requires that "All essential elements of a crime ... must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (En banc). The federal rule is the same, tersely stated as "An indictment must set forth each element of the crime that it charges." *Almendarez-Torres v. United States*, 523 U.S. 224, 228, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). The United States Supreme Court thus tells us that we may rely on the Gaum indictment in this case on the question of the essential elements of the crimes charged.

The trial court was able to compare elements from the indictment provided. Thus it is simply not true that "nothing in the record shows that the Gaum statutes in effect in 1992 were 'substantially similar' to their Washington counterparts at that time." Brief at 18. The indictment is in the record and makes the required showing. This claim fails.

2. The trial court did not unconstitutionally find facts that increased punishment.

The foregoing addressed the information available to the trial court in engaging legal comparability analysis. Here, Salas Torre assails the trial court for using the documents submitted to establish factual comparability.

Salas Torre relies on *State v. Irby*, 187 Wn. App. 183, 347 P.3d 1103 (2015) *review denied* 184 Wn.2d 1036 (2016). That case does not support his position. Irby is an aggravated murder case. The case had been up to the Supreme Court and this was his appeal after conviction in a second trial. Id. at 189. In this second appeal, his aggravated murder conviction was again reversed for reasons not relevant to the present case. But that reversal only saved Irby one life without parole sentence. He was also convicted of first degree burglary, which was his third strike under RCW 9.94A.570. 187 Wn, App. at 204-05. That is, it was his third strike if a 1976 Washington conviction for second degree statutory rape is counted. Id.

This case, then, is not about foreign convictions. Nonetheless, since second degree statutory rape is no longer a crime, in order to count it the trial court engaged in a comparability analysis of that crime with current Washington law. The trial court decided that the offense is

comparable to the present crime of second degree rape of a child. 187 Wn. App. at 205.

The Court of Appeals found that the two offenses were not legally comparable. For the statutory rape, the state needed to prove that Irby was over the age of 16. Id. at 205-06. For the child rape, the state needed to prove that Irby was 36 months older than the victim. Id. And, "[a]nother difference is that the former statutory rape offense was defined to include 11–year–old victims, while only 12– and 13–year–old victims are included in the current offense of second degree child rape." 187 Wn. App. at 206. Thus the offenses were not legally comparable.

The *Irby* Court then noted that attempts at factual comparability may run afoul of *Apprendi v. New Jersey*.[5] Thus, regarding the underlying facts of Irby's statutory rape conviction the trial court was constrained to consider only facts that were "admitted, stipulated to or found by the trier of fact beyond a reasonable doubt." 187 Wn. App. at 206-07. And, since Irby went to trial, there were no admissions or stipulations. Id. Thus comparability must be established by facts found by the jury beyond a reasonable doubt. The information provided to the trial court did not resolve the age 16 versus 36 months older issue; neither the information nor the verdict form could establish that Irby was 36 months older at the

[5] 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000)

time of the offense. Id. The trial court solved this problem by looking at "certified records from other cases." Id.

The trial court violated the rule by judicial fact finding from other cases and the state conceded as much on appeal. 187 Wn. App. at 207-08. Although the case speaks of *Apprendi,* because of the state's concession it does not hold that the trial court improperly behaved. At bottom, *Irby* is simply a case in which the state failed in its burden to establish comparability either legally or factually. A specific element, the 36 months older element, could not be established with the information before the court. That case simply does not establish that the trial court in the present case erred.

In the present case, Salas Torre does not similarly point to an element that will not fit either legally or factually. Moreover, Salas Torre does not tell us what fact was improperly found by the trial court. He merely alleges that the trial court did rely on improper fact finding without telling us what fact was improperly found. At the cited passage of the transcript (RP, 5/36/17. 36-37), the trial court simply agrees with the state that, based on the elements in the Gaum indictment, the Gaum second degree criminal sexual conduct offenses are comparable to the Washington crime of second degree assault with sexual motivation as a

matter of law. This finding was based on the trial court's consideration of Washington statutory law, not on improper findings of fact.

3. The Gaum convictions do not wash-out.

Salas Torre argues that his Gaum convictions that are comparable to Washington Class B offenses should have not been counted under the wash out provision of RCW 9.94A.525(2)(b). He asserts his own allocution as proof of the fact that he has spent 12 crime free years in the community. RP, 5/26/17, 56.

The statute provides

> Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(b). Salas Torre claims that the two second degree criminal sexual conduct convictions that the trial court converted to two second degree assault with sexual motivation offenses must wash out because Salas Torre said in his allocution that he had been released and had spent 12 years without committing another crime.

The state is unconvinced by Salas Torre's reading of RCW 9.94A.030(47). The subsection .030. definition includes eight subsections

that are disjunctive ("or"). The two involved in this case are subsection "(c) A felony with a finding of sexual motivation…" and "(d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection."

In this case, it is seen what an out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under subsection (a) looks like: the comparability of Gaum's first degree criminal sexual conduct with Washington's crime of third degree rape. Since the first degree criminal sexual conduct is comparable to third degree rape, and because third degree rape is a sex offense "under the laws of this state," first degree criminal sexual conduct is a sex offense for sentencing purposes. The question of whether or not a foreign conviction is anything at all under Washington law cannot be entertained until it is first determined what sort of offense it is by comparison to Washington law. If the comparable Washington crime is found in RCW chapter 9A.44, then it is a sex offense.

Similarly, second degree criminal sexual conduct cannot be categorized under Washington law until it is compared to Washington law. That comparison results in finding that second degree assault with sexual motivation is the comparable offense. Second degree assault is a felony.

Thus, by 9.94A.030(47)(c) the offense here in issue is a "sex offense" and properly scored as sex offenses do not wash out.

4. The facts do not establish same criminal conduct.

a. The issue of same criminal conduct was not preserved.

First, this issue was not preserved. Salas Torre made no argument or lodged any objection on this point below. He makes no argument here that the issue implicates a manifest constitutional error that may be raised for the first time on appeal. Same criminal conduct is not such an issue and should not be reviewed here.

b. The offenses were not same criminal conduct.

Second, here we are confronted with the same analytical problem faced with the above wash out issue; that is, in making a determination of same criminal conduct under Washington law, are we to attempt to parse the elements of the Gaum offenses or are we to consider the question by reference to the comparable Washington offenses? Once again here it seems that the trial court should focus on the comparable Washington crimes in doing a same criminal conduct inquiry. This because the statutory elements do matter under the current test for same criminal conduct as announced by the Washington Supreme Court.

The defendant bears the burden of establishing same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013).

A trial court's determination of this question is reviewed for abuse of discretion. *Graciano*, 176 Wn.2d at 536.

The Washington Supreme Court's most recent decision on RCW 9.94A.589(1)(a) is *State v. Chenoweth*, 185 Wn2d 218, 370 P.3d 6 (2016). In the decision, the Court seems to have no problem with the idea that child rape and incest are crimes that show intent. And, "[t]he intent to have sex with someone related to you differs from the intent to have sex with a child." 185 Wn.2d at 223. Thus, "Chenoweth's single act is comprised of separate and distinct statutory criminal intents and therefore under RCW 9.94A.589(1)(a) do not meet the definition of same criminal conduct." Id. (emphasis added) (internal quotation omitted). Further, the Court found that the legislature intended to punish incest and rape as separate offenses. Id. at 224. Finally, the Court concluded that it was advancing a "straightforward analysis of the statutory criminal intent of rape of a child and incest." Id.

In the present case, Salas Torre ignores the Supreme Court majority's "straightforward analysis" and argues the overarching objective criminal purpose rule that is championed by the Chenoweth dissent. But after Chenoweth, the inquiry focuses on statutory intent, not on some judicially created overarching criminal purpose. The straightforward statutory approach arguable makes the law more certain by avoiding

subjective questions designed to divine a particular defendant's particular overarching criminal purpose.

Here, Salas Torre can credibly argue that the same criminal conduct elements of same time, place, and victim are established by the available information. Same criminal intent is not so easy. No particular mens rea element is found in Gaum's first degree criminal sexual conduct statute. CP 170. Following Chenoweth we see that the gravamen of the offense is "sexual penetration." Id. Thus to commit this crime Salas Torre had to have intended penetration of his victim. The crime of second degree criminal sexual conduct again has no mens rea but is aimed at "sexual contact." CP 171. Thus there need be no intent to penetrate for this second degree offense, only an intent to have sexual contact. And, finally, the kidnapping required an intent to "remove [the person]…a substantial distance from the vicinity where she was found." CP 159.

These are all separate crimes. Their commission requires different intentions just as incest and child rape had different intentions in Chenoweth. Moreover, the various counts are separate instances of the same crime, e.g., three separate penetrations under the first degree criminal sexual conduct. *See The People of the Territory of Gaum v. Michael J.S. Torre*, 68 F.3d 1177 (9th Cir. 1995); CP 164.

The record in this case is insufficient to establish that Salas Torre had the same intent in the commission of his various crimes. Under Chenoweth, it appears at least prima facie that he did not. This claim fails.

E. TRIAL COUNSEL DID NOT PROVIDE DEFICIENT PERFORMANCE.

In order to overcome the strong presumption of effectiveness, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. The reviewing court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; In re Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). To show prejudice, the defendant

must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson,* 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

First, if Salas Torre's arguments about comparability and same criminal conduct are correct, he would get less points and thus a lower sentence. Prejudice would be established.

As argued, the trial court did not err in doing comparability. This lack of error forecloses a finding of deficient performance for not objecting. With appropriate deference, counsel knew that the *Lavery* decision allows the trial court to review an indictment in the doing of the comparison. We have seen that the indictment is required to contain the essential elements of the crime charged. Moreover, counsel would know that the indictment charges crimes that were then extant. What else would be charged?

With regard to same criminal conduct, the argument here is the same as above. Under the approach to this question taken by the *Chenoweth* court, it is unclear that the Gaum offenses would be same criminal conduct under Washington law. *Chenoweth's* focus on the actual intent of the offender as to each legislatively defined crime, rather than a judicially created overarching criminal purpose, makes it unlikely that

Salas Torre's various convictions could be found to have the same intent. In these circumstances, counsel was not deficient for not raising this issue.

IV. CONCLUSION

For the foregoing reasons, Torre's conviction and sentence should be affirmed.

DATED January 31, 2018.

Respectfully submitted,
TINA R. ROBINSON
Prosecuting Attorney

JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney
kcpa@co.kitsap.wa.us

KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

January 31, 2018 - 2:06 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50405-7
Appellate Court Case Title:	State of Washington, Respondent v. Michael Torre, Appellant
Superior Court Case Number:	16-1-00970-9

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